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In the Supreme Court of the United States

ENTERGY CORP., *Petitioner*,
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

PSEG FOSSIL LLC AND PSEG NUCLEAR LLC,
Petitioners,
v.
RIVERKEEPER, INC., ET AL., *Respondents.*

UTILITY WATER ACT GROUP, *Petitioner*,
v.
RIVERKEEPER, INC., ET AL., *Respondents.*

On Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR PETITIONERS ENTERGY CORP., PSEG FOSSIL LLC, AND PSEG NUCLEAR LLC

ELISE E. ZOLI
Counsel of Record
KEVIN P. MARTIN
ROBERT H. FITZGERALD
ALADDINE D. JOROFF
KEVIN P. PECHULIS
GOODWIN PROCTER LLP
53 STATE STREET
BOSTON, MA 02109
(617) 570-1000
Counsel for Entergy Corp.

MAUREEN E. MAHONEY
Counsel of Record
PHILIP J. PERRY
J. SCOTT BALLENGER
CASSANDRA S. BERNSTEIN
DREW C. ENSIGN
LATHAM & WATKINS LLP
555 11TH STREET, NW
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200
Counsel for PSEG Fossil LLC, PSEG Nuclear LLC

Additional Counsel Listed on Inside Cover

JULY 14, 2008

ABIGAIL HEMANI
GOODWIN PROCTER LLP
NEW YORK TIMES BUILDING
620 8TH AVENUE
NEW YORK, NY 10018
(212) 813-8800

CHUCK D. BARLOW
ENTERGY SERVICES, INC.
308 E. PEARL STREET
JACKSON, MS 39201
(601) 969-2542
Counsel for Entergy Corp.

KARL S. LYTZ
LATHAM & WATKINS LLP
505 MONTGOMERY STREET
SUITE 2000
SAN FRANCISCO, CA 94111
(415) 391-0600

JOHN G. VALERI, JR.
PSEG SERVICES CORP.
OFFICE OF ENVIRONMENTAL
COUNSEL
80 PARK PLAZA, T5C
NEWARK, NJ 07102-4194
(973) 430-5506
Counsel for PSEG Fossil LLC, PSEG Nuclear LLC

QUESTION PRESENTED

Whether §316(b) of the Clean Water Act, 33 U.S.C. §1326(b), authorizes the Environmental Protection Agency (EPA) to compare costs with benefits in determining the "best technology available for minimizing adverse environmental impact" at cooling water intake structures.

PARTIES TO THE PROCEEDING

In the United States Court of Appeals for the Second Circuit, the petitioners were Riverkeeper, Inc., Natural Resources Defense Council, Waterkeeper Alliance, Soundkeeper, Inc., Scenic Hudson, Inc., Save the Bay-People for Narragansett Bay, Friends of Casco Bay, American Littoral Society, Delaware Riverkeeper Network, Hackensack Riverkeeper, Inc., New York/New Jersey Baykeeper, Santa Monica Baykeeper, San Diego Baykeeper, California Coastkeeper, Columbia Riverkeeper, Conservation Law Foundation, Surfrider Foundation, State of Rhode Island, State of Connecticut, State of Delaware, Commonwealth of Massachusetts, State of New Jersey, State of New York, Appalachian Power Company, Illinois Energy Association, Utility Water Act Group, Entergy Corporation, and PSEG Fossil LLC and PSEG Nuclear LLC (collectively "PSEG"). The respondents were United States Environmental Protection Agency and Stephen L. Johnson, in his official capacity as Administrator of the United States Environmental Protection Agency. Appalachian Power Company and the Illinois Energy Association are not parties to this appeal.

Pursuant to Supreme Court Rules 24.1 and 29.6, there is no change to the corporate disclosure statement previously filed by Entergy or PSEG.

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OPINION BELOW

The opinion of the U.S. Court of Appeals for the Second Circuit (Pet.App.1a–94a[1]) is reported at 475 F.3d 83 ("*Riverkeeper II*").

JURISDICTION

The Second Circuit entered judgment on January 25, 2007, and denied petitions for rehearing and rehearing *en banc* on July 5, 2007. After this Court extended the time for filing petitions for certiorari, petitioners timely filed petitions on November 2, 2007. This Court granted certiorari on April 14, 2008. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves §316(b) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act ("CWA" or "Act"), 33 U.S.C. §1326(b).[2] This provision and other relevant portions of the CWA are reproduced in the addendum to this brief and at Pet.App.97a–121a. The U.S. Environmental Protection Agency's ("EPA") rule at issue here (the "Phase II rule") is codified at 40 C.F.R. pt. 125, subpt. J, and reproduced at Pet.App.122a–593a.[3]

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1 Citations to "Pet.App." refer to the Appendix to the Petition for Certiorari filed by Entergy Corp. in No. 07-588. "J.A." refers to the Joint Appendix filed herewith.

2 We refer to CWA sections ("§316(b)") and, where appropriate, provide citations to the U.S. Code ("33 U.S.C. §1326(b)").

3 "National Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling Water Intake

STATEMENT OF THE CASE

Section 316(b) of the Clean Water Act states that "[a]ny standard established pursuant to section 1311 of this title or section 1316 of this title and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." 33 U.S.C. §1326(b). The issue here is whether, as respondents contend, EPA is forbidden from considering costs in relation to benefits when selecting the "best technology available for minimizing adverse environmental impact" ("BTA") for cooling water intake systems. In their view, with very few exceptions, EPA *must* require each of the Nation's existing base-load electric-generating facilities to retrofit with any technology capable of saving additional fish or other aquatic organisms from being trapped against components of the intake structure ("impinged") or drawn into the cooling water system itself ("entrained")—a requirement that will cost hundreds of millions or billions of dollars per facility, regardless of the cost or actual environmental benefit. Pet.App.170a–71a, 255a–56a (69 Fed. Reg. at 41,586, 41,605).

For 30 years, EPA implemented §316(b) on a facility-by-facility basis, rejecting the application of particular intake structure technology at a given facility if the costs would be "wholly disproportionate" to the environmental benefits. In this rulemaking, EPA set national performance standards for cooling water intake structures at Phase II existing facilities

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Structures at Phase II Existing Facilities," 69 Fed. Reg. 41,576 (July 9, 2004).

by determining ranges of reductions in impingement mortality and entrainment that could be achieved in a cost-effective manner, and identifying a number of technologies capable of achieving such results. EPA also quite reasonably included a provision in the rule authorizing site-specific determinations of BTA where, in relevant part, the costs of retrofitting a particular facility would be "significantly greater than" the environmental benefits. *See* Brief of Petitioner Utility Water Act Group ("UWAG Br."), at 6-11, 23-25, 42-57.

The Second Circuit invalidated EPA's balanced rule, adopting a radical interpretation of §316(b) under which EPA must set national standards without regard to cost, except that EPA may decline to require technologies that could not be borne by the industry *as a whole*. That individual base-load electric plants would be forced to shut down did not trouble the court. Likewise, at the site-specific level, EPA must require technologies that impose costs for *no* guaranteed additional benefits over a substantially less costly alternative technology. The Second Circuit reached this radical conclusion in part by reading this Court's precedents as effectively imposing a "clear statement" requirement for cost-benefit analysis, one forbidding agencies from weighing costs and benefits in implementing *any* statute unless Congress has expressly granted the agency permission to do so.

The Second Circuit's decision is wrong. This Court's precedents impose no clear statement rule for cost-benefit analysis. Such a rule is inconsistent with ordinary rules of deference to agencies and is wholly unwarranted. Even if such a rule did exist, §316(b), read both alone and within the broader structure of the Act, plainly permits EPA to weigh costs and benefits in

regulating cooling water intake structures. Other sections of the Act cross-referenced by §316(b) specifically authorize EPA to consider costs, as well as any other factors it deems appropriate. At a bare minimum, §316(b) is at least ambiguous on the question of cost-benefit analysis, and EPA's interpretation is reasonable and therefore entitled to deference. And EPA's authority to permit a site-specific determination of BTA is clearly consistent with both §316(b) and its general authority to provide variances from regulatory requirements. *See* UWAG Br. at 42-57.

Unless reversed, the Second Circuit's decision will undermine the ability of EPA and other agencies to use cost-benefit analysis to further rational decisionmaking. It will undermine agency efforts to set rigorous national standards secure in the knowledge that the agency can impose alternative requirements where the benefits clearly do not justify the costs. And, as the U.S. Department of Energy forewarned in this rulemaking, it will jeopardize the United States' core electric generating capacity through a regime of potentially perpetual retrofitting driven by changes in intake structure technology and the applicable five-year permit renewal cycle, with the massive expenditures and lengthy shutdowns such retrofits would entail. *See, e.g.*, J.A.311-13; J.A.320–24; J.A.345-51.

A. Background

1. Cooling Systems

To ensure safe, efficient operation, steam electric-generating facilities (such as those owned by petitioners Entergy and PSEG) require some means to absorb or dissipate the waste heat created by power

generation. Most such facilities draw in surface water to circulate through their systems as a coolant.

The amount of cooling water needed and the means by which that water is drawn into a facility are fundamental facets of plant design. Broadly speaking, there are three categories of cooling systems. Some facilities draw in water, pass it once through the plant, then release most of it back to surface waters ("once-through cooling"). Pet.App.554a (69 Fed. Reg. at 41,685). Other facilities draw water into cooling towers, ponds, or other structures, circulate it several times through the plant for cooling, and consume the vast majority by releasing it to the air as water vapor, with only a small discharge back to surface waters (wet "closed-cycle" cooling systems). Pet.App.551a (69 Fed. Reg. at 41,684); J.A.319. And yet others utilize so-called "dry cooling," which principally relies on air instead of water for cooling. Pet.App.8a n.3.

All cooling systems have environmental and energy advantages and disadvantages, and EPA carefully considered these differences in developing the rule. Pet.App.253a–54a (69 Fed. Reg. at 41,604). Once-through cooling systems optimize energy output and minimize air emissions, but they sometimes add heat to the receiving water. They also withdraw larger volumes of water, and thus increase the potential for impingement and entrainment. Pet.App.239a–40a (69 Fed. Reg. at 41,601). In comparison, both closed-cycle and dry cooling systems withdraw less water and add little or no heat to the receiving water, but they are less effective at cooling and therefore reduce the efficiency and electric output of the facilities using them. *Id.*; Pet.App.257a–58a (69 Fed. Reg. at 41,605); J.A.318-22.

For example, when a once-through system is converted to a closed-cycle system (which may not always be feasible and requires the facilities to be taken offline), the retrofitted facility is capable of generating less energy using the same amount of fuel due to the differences in water temperature. J.A.320. Because this permanent "energy penalty" can be up to 5% or more of a facility's output, requiring facilities to convert to closed-cycle cooling negatively affects energy supply and electric system reliability. J.A.320-25; J.A.333-34; Pet.App.257a–58a (69 Fed. Reg. at 41,605). It also requires greater consumption of fuels to make up for the energy penalty which, in turn, generally results in increased air emissions of carbon dioxide and other pollutants. Pet.App.258a (69 Fed. Reg. at 41,605); J.A.325-26.

In addition, closed-cycle and dry cooling systems may create other adverse environmental impacts, such as requiring more land use, causing fogging and icing, and increasing noise pollution. Pet.App.259a (69 Fed. Reg. at 41,606); J.A.316-17; J.A.325.

2. Section 316(b) of the Clean Water Act

Section 316(b) occupies a unique place within the CWA, for (unlike most other sections) it does not address the *discharge* of pollutants but rather the environmental impacts associated with the *withdrawal* of water by cooling water intake structures. Pet.App.151a (69 Fed. Reg. at 41,582). Such impacts include, but are not limited to, impingement and entrainment. Pet.App.169a (69 Fed. Reg. at 41,586) (impacts "depend[] on conditions at the individual site").

The Second Circuit has twice acknowledged that §316(b) was "something of an afterthought." *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 186 n.12 (2d Cir. 2004) ("*Riverkeeper I*"); *see also* Pet.App.4a–5a. This "afterthought" status is reflected in the legislative history. In the sole reference to §316(b), Representative Clausen, a Floor Manager for the Conference Report for the 1972 Act, explained:

> Section 316(b) requires the location, design, construction, and capacity of cooling water intake structures ... to reflect best technology available for minimizing adverse environmental impact. The reference here to "best technology available" is intended to be interpreted to mean *the best technology available commercially at an economically practicable cost.*

118 Cong. Rec. 33,762 (1972) (emphasis added).

3. Technology Requirements Under §§301 and 306

Section 316(b) explicitly links the determination of BTA for cooling water intake structures to the process for setting standards for the *discharge* of various pollutants under CWA §§301 and 306, 33 U.S.C. §§1311, 1316. Accordingly, the Second Circuit and the parties before this Court agree that those provisions inform the interpretation of §316(b)—though they disagree on the lessons to be drawn.

For new facilities, §306 requires EPA to establish "standards of performance" that "reflect[] the greatest degree of effluent reduction which the Administrator

determines to be achievable through application of the best available demonstrated control technology" ("BADT"). 33 U.S.C. §1316(a)(1), (b)(1)(B). This standard reflects Congress's understanding that it is more feasible and economical to install technologies when a facility is being constructed. *See Riverkeeper I*, 358 F.3d at 185; Pet.App.360a. Nonetheless, EPA is authorized to consider "the cost of achieving such effluent reduction," as well as any non-water quality impacts and energy requirements, when setting BADT standards. 33 U.S.C. §1316(b)(1)(B).

Section 301 requires all point sources, whether existing or new, to comply with a series of technology-based pollutant discharge limitations. 33 U.S.C. §1311(b)–(e). First enacted in 1972, but subsequently amended as explained below, §301 originally contemplated two phases of standards for all dischargers. The initial phase required facilities to implement the "best practicable control technology currently available" ("BPT"). In establishing a BPT standard, EPA *must* compare "the *total cost* of application of technology in relation to the *effluent reduction benefits* to be achieved from such application." 33 U.S.C. §1314(b)(1)(B) (emphasis added); *see Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1045 (D.C. Cir. 1978) (referring to costs and benefits as "'comparison factors'"). In other words, EPA is *required* to perform cost-benefit analysis in selecting BPT.

By 1983, those initial BPT standards were to be followed by "best available technology economically achievable" ("BAT") standards. Pub. L. No. 92-500, 86 Stat. 844–46 (1972). Congress directed EPA, when setting BAT standards, to "take into account" factors

enumerated in §304(b)(2)(B), including "the cost of achieving such effluent reduction ... *and such other factors as the Administrator deems appropriate.*" 33 U.S.C. §1314(b)(2)(B) (emphasis added). Congress did not, however, specify how EPA must consider those factors. *Weyerhaeuser*, 590 F.2d at 1045. As the D.C. Circuit has explained, under BAT "[a]ll factors, including costs and benefits," are not mandatory "'comparison factors,'" as under BPT, but rather are discretionary "'*consideration* factors'" that give EPA flexibility in deciding how much weight to give each factor. *Id.* (emphasis added).

To provide additional flexibility to address unanticipated adverse economic and social consequences stemming from the BAT requirements, Congress included a safety valve in the 1972 Act. Section 301(c) authorizes a variance from BAT standards where the individual discharger can show that an alternate limit represents the maximum use of technology within its economic capability and will result in "reasonable further progress" toward the elimination of discharges. 33 U.S.C. §1311(c). This provision contemplates a kind of "economic capability/effluent reduction balancing." *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 77 n.16 (1980).

While §301 of the 1972 Act contemplated all discharges of pollutants being subject first to BPT and then to BAT standards under §301, Congress amended the Act in 1977 to create a three-tiered regulatory system, the goal of which was to regulate specific tiers of pollutants based on the actual threat they posed. At the top in terms of potential harm are toxic pollutants, which include "disease-causing agents ... [that] will ... cause death, disease, behavioral abnormalities, cancer

... or physical deformations," among other harms. 33 U.S.C. §1362 (definition). Toxic pollutants remain subject to the BAT standard, which still allows EPA to consider what weight to give costs and benefits. *See* 33 U.S.C. §1311(b)(2)(C)–(D); *id.* §1317 (toxic effluent standards).

Congress also established a category of "conventional pollutants," which need only comply with the "best conventional pollutant control technology" ("BCT") standard. 33 U.S.C. §1311(b)(2)(E). BCT, like the 1972 Act's BPT standard, *requires* EPA to evaluate "the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived." 33 U.S.C. §1314(b)(4)(B). In other words, the 1977 amendments *mandated* cost-benefit analysis for conventional pollutants.

Finally, Congress created a tier of pollutants referred to as "non-conventional, non-toxic" pollutants, such as chlorine. In the 1977 amendments Congress retained the BAT standard for these pollutants, but it also provided, in §301(g) of the Act, a waiver provision allowing EPA to set less stringent limits so long as (among other requirements) the lesser standards would still ensure "protection and propagation of a balanced population of shellfish, fish, and wildlife." 33 U.S.C. §1311(g)(2)(C).

In sum, the CWA provides EPA considerable authority to weigh costs and benefits to ensure rational regulatory outcomes, either mandating or permitting cost-benefit analysis for each of the categories of pollutants established by the amendments to §301. For non-conventional pollutants, cost and benefits may be

considered under both EPA's BAT discretionary authority and the §301(g) variance. For conventional pollutants, cost-benefit analysis is now required. And, even for toxic pollutants, EPA may consider "the cost of achieving such effluent reduction" and "such other factors as [EPA] deems appropriate" in setting BAT standards, and may modify standards based on the economic capability/effluent reduction balancing authorized by §301(c).

4. EPA's Phase II Rulemaking

In 1976 EPA promulgated its first final rule under §316(b), but the Fourth Circuit remanded it one year later on procedural grounds. *See Appalachian Power Co. v. EPA*, 566 F.2d 451, 457 (4th Cir. 1977); Pet.App.159a–60a (69 Fed. Reg. at 41,583–84). For the next 30 years, EPA and state permitting authorities implemented §316(b) on a case-by-case basis, weighing costs and benefits in approving intake structures. Pet.App.355a (69 Fed. Reg. at 41,627). At EPA's direction, permitting authorities declined to require "use of technology whose cost is wholly disproportionate to the environmental benefit to be gained." *In re Pub. Serv. Co. of N.H., (Seabrook Station, Units 1 and 2)*, 1977 WL 22370 (EPA), at *7, 1 E.A.D. 332 (June 10, 1977), J.A.76; *see also* UWAG Br. at 15-16, 37-41.

The current §316(b) rulemaking originated in a 1995 consent decree that required EPA to promulgate national §316(b) regulations. The rulemaking was conducted in three phases. In Phase I, EPA set forth standards for cooling water intake structures at new steam-electric generating facilities. The Phase II rule, at issue here, governs the Nation's approximately 550

large existing power-producing plants, each designed with the capacity to withdraw at least 50 million gallons of water per day and to use at least 25% of the water exclusively for cooling purposes. *See* Pet.App.124a, 203a (69 Fed. Reg. at 41,576, 41,593). These facilities comprise approximately 50% of the Nation's electric power supply. Office of Water, EPA, *Economic & Benefits Analysis for the Final Section 316(b) Phase II Existing Facilities Rule*, at A2-2 (2004) (50% of total projected for 2008), *available at* http://www.epa.gov/waterscience/316b/phase2/econbenefits/final.htm; *id.* at A3-13.[4] And in Phase III, EPA promulgated regulations governing existing facilities not covered under Phase II (including smaller power plants) and new offshore oil and gas facilities.[5]

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[4] To implement the requirements of the Phase II rule for existing facilities, EPA chose to rely on the National Pollutant Discharge Elimination System ("NPDES") permit-renewal process set forth in §402, 33 U.S.C. §1342(a)(1). *See* Pet.App.150a–52a (69 Fed. Reg. at 41,582). The NPDES re-permitting process requires existing dischargers to apply for a renewed NPDES permit every five years. While §402 on its face is limited to discharge requirements, the Second Circuit deferred to EPA's determination that NPDES permits may be used to impose new intake structure requirements on existing facilities. Pet.App.15a.

[5] As explained below, the Second Circuit resolved challenges to the Phase I rule in 2004, explicitly affirming EPA's use of cost-benefit analysis in choosing BTA for new facilities. The Phase III rule authorizes permit writers to select BTA for existing facilities on a case-by-case basis using the same type of cost-benefit analysis rejected by the Second Circuit here. 71 Fed. Reg. 35,006, 35,014–15, 35,016–17 (June 16, 2006). Challenges to the Phase III rule are currently pending in the Fifth Circuit. *See* UWAG Br. at 16-17 n.15.

In developing the Phase II rule, EPA targeted assumed impingement mortality and entrainment, under the assumption that doing so would assist aquatic populations taxed by, among other things, over-fishing. *See* Pet.App.169a, 188a (69 Fed. Reg. at 41,586, 41,590).[6] Rejecting a nationwide mandate of closed-cycle cooling, the Agency concluded that the best technology available for minimizing adverse environmental impact varies among sites. Pet.App.255a (69 Fed. Reg. at 41,605). It therefore crafted the rule to require "technology that is technically available, economically practicable, and cost-effective while at the same time authorizing a range of technologies that achieve comparable reductions in adverse environmental impact." Pet.App.157a–58a (69 Fed. Reg. at 41,583).[7]

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[6] As EPA explained, the technical information on which it relied to reach its assumptions about entrainment and impingement was anecdotal and, in many cases, outdated and/or highly imprecise. Pet.App.181a–82a (69 Fed. Reg. at 41,588) (many studies "based on limited data ... collected ... 25 years ago" and containing "serious study design limitations"). EPA also acknowledged that it was guided by a precautionary principle, one that it indicated would be subject to further analysis in the site-specific application of the rule. Pet.App.183a–84a (69 Fed. Reg. at 41,589).

[7] The Second Circuit drew a distinction between "cost effectiveness" analysis, which it believed permits only a search for the cheapest way of achieving a given result, and "cost benefit" analysis, which permits a true weighing of marginal costs and benefits. *See infra*, at 18–20. EPA sometimes used the phrase "cost effectiveness" in the rule, but not in the narrow sense meant by the Second Circuit. *See* Pet.App.263a (69 Fed. Reg. at 41,606). EPA explained that it "consider[ed] the cost of technologies in relation to the reductions in impingement mortality and entrainment achieved," which clearly is a form of *cost-benefit*

EPA determined that the goal of "minimizing adverse environmental impact" was best achieved by national performance standards that require all Phase II facilities to reduce impingement mortality by 80-95% from an uncontrolled level ("calculation baseline") and, when appropriate, entrainment by 60-90%. *See* Pet.App.560a (40 C.F.R. §125.94(b)(1)–(2)) (requiring compliance with entrainment standards based on capacity utilization rate and, in relevant part, location on a particular waterbody type, such as an estuary or ocean). EPA explained that these performance standards "reflect best technology available [and] ... are not based on a single technology but, rather, are based on consideration of [the] range of technologies that EPA has determined to be commercially available for the industries affected as a whole." Pet.App.228a (69 Fed. Reg. at 41,599). The standards therefore reflect the Agency's judgment that, "given the wide range of various factors that affect the environmental impact posed by Phase II existing facilities, different technologies or different combinations of technologies can be used and optimized to achieve the performance standards." Pet.App.226a (69 Fed. Reg. at 41,598); *see also* Pet.App.228a (69 Fed. Reg. at 41,599) ("range of available technologies ... used to derive the performance standards").

In developing the national BTA requirements, EPA determined that existing facilities have far less flexibility than new facilities because their intake

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analysis under the Second Circuit's terminology. EPA Second Cir. Br. at 55; *see also id.* at 50 ("EPA's cost-effectiveness analysis compares the *incremental* costs of technology to its *incremental* effectiveness in minimizing ... impingement mortality and entrainment.").

structures have already been located, designed, and constructed. Pet.App.141a (69 Fed. Reg. at 41,580) (limitations include space, as well as location and development on a waterbody); Pet.App.255a (69 Fed. Reg. at 41,605) (retrofits "may be impossible or not economically practicable"). EPA therefore included two alternative compliance options—both allowing a facility to request a site-specific determination of best technology available for minimizing adverse environmental impact in certain circumstances. Pet.App.193a, 195a–96a (69 Fed. Reg. at 41,591). These provisions reflect EPA's longtime reading of §316(b) as "indicat[ing] that site-specific conditions can be highly relevant to the determination of BTA to minimize adverse environmental impact." Pet.App.351a–52a (69 Fed. Reg. at 41,626); *see* UWAG Br. at 15-16, 37-41 (history of case-by-case permitting).

At issue here is the site-specific determination based on a "cost-benefit test," which allows facilities to request establishment of site-specific standards where they can demonstrate that the costs of meeting the national standards would be substantially greater than the benefits. Pet.App.249a–51a (69 Fed. Reg. at 41,603–04); Pet.App.559a (40 C.F.R. §125.94(a)(5)(ii)). The technology selected by the permitting authority for a facility qualifying under this provision "must achieve an efficacy level that comes as close as practicable to the applicable performance standards without resulting in significantly greater costs." Pet.App.196a (69 Fed. Reg. at 41,591).

5. *Riverkeeper I*

Five months before EPA issued the Phase II rule, the Second Circuit resolved challenges to EPA's Phase

I rule in *Riverkeeper I*. In relevant part, environmental petitioners (respondents here) challenged EPA's selection of closed-cycle cooling over dry cooling as BTA for new facilities. EPA had selected closed-cycle cooling on the basis that, *inter alia*, "dry cooling costs more than ten times as much per year as closed-cycle wet cooling," but provided only incremental improvements in reducing impingement mortality and entrainment. *Riverkeeper I*, 358 F.3d at 194–95. Environmental petitioners challenged this weighing of costs and benefits, arguing that "because section 316(b) does not mention cost or other factors, the EPA cannot give them any weight ... and even if the EPA was permitted to consider those factors, it abused its discretion in weighing them." *Id.* at 195.

The Second Circuit squarely rejected this argument and upheld EPA's choice of BTA. First, the court determined that the cross-reference to §306 in §316(b) "is an invitation [for EPA] to look to section 306 for guidance" in selecting BTA for new facilities. *Id.* at 186. The court observed that even when setting new source performance standards under §306, EPA is authorized to "'take into consideration,'" among other factors, "'the cost of achieving such effluent reduction.'" *Id.* at 195 (quoting §306). The court thus concluded that "EPA was permitted to consider cost and energy efficiency in determining the 'best technology available.'" *Id.*

The Second Circuit also noted that "'[a]ppellate courts give EPA considerable discretion to weigh and balance the various factors'" applicable to §306, including cost. *See id.* at 195 (quoting *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 570 (D.C. Cir. 2002)). Addressing the Phase I rule, the court explained that

"*it is undeniably relevant that the difference*" in impingement and entrainment reduction offered by dry cooling "*represents a relatively small improvement over closed-cycle cooling at a very significant cost.*" *Riverkeeper I*, 358 F.3d at 194 & n.22 (emphasis added). Accordingly, the Second Circuit rejected the environmental petitioners' challenge and deferred to EPA's selection of closed-cycle cooling, concluding that the court (unlike EPA) was "not well equipped ... to meaningfully weigh" the incremental benefits of dry cooling against its incremental environmental and monetary costs. *Id.* at 196 (EPA better placed to compare entrainment reductions against "300 pounds of mercury, and $443 million").

B. The Decision Below

The Phase II rule was challenged by environmental and state respondents, as well as industry petitioners, with the challenges consolidated before the Second Circuit in *Riverkeeper II*. Of relevance here, environmental and state petitioners challenged EPA's designation of a suite of technologies—as opposed to closed-cycle cooling—as BTA, as well as the provision allowing site-specific BTA determinations based on a "cost-benefit test." Pet.App.20a. As in *Riverkeeper I*, they argued that §316(b) does not permit weighing of costs and benefits, and also argued that EPA exceeded its authority in rejecting closed-cycle cooling as BTA for all existing facilities. *Id.*; Pet.App.29a n.14.

The Second Circuit accepted those arguments in a confusing opinion that misunderstands the language of §316(b) and other cross-referenced provisions of the Act, fails to defer to EPA's interpretation, and ignores its own holding—reached just three years earlier in

Riverkeeper I—that EPA has "'considerable discretion to weigh and balance'" costs and benefits in regulating under §316(b). *Riverkeeper I*, 358 F.3d at 195 (citation omitted).

The Second Circuit presented three bases for its conclusion that cost-benefit analysis is prohibited under §316(b). First, the Second Circuit reasoned that "[t]he BTA standard of section 316(b) ... is linguistically similar to the BAT standard of section 301 and the standard that applies to new sources under section 306." Pet.App.23a. Accordingly, the court explained, "to the extent that cost-benefit analysis is precluded under those sections"—a reading rejected by other courts, as explained below—"it is similarly not permitted under section 316(b)." *Id.*

To reach this idiosyncratic reading of §§301 and 306, the Second Circuit focused on the differences between §301's BPT and BAT standards, which the court read as having "clearly signaled Congress's intent to move cost considerations ... from a cost-benefit analysis *to a cost-effectiveness one.*" Pet.App.22a (emphasis added). "Cost-effectiveness," according to the Second Circuit, means that, within "a narrowly bounded range," EPA "may permissibly choose between two (or more) technologies that produce essentially the same benefits but have markedly different costs." Pet.App.28a, 22a. As applied to §316(b), the Second Circuit explained that "cost-effectiveness" means that, if EPA is "given a choice between a technology that costs $100 to save 99-101 fish and one that costs $150 to save 100-103 fish," it "could appropriately choose the cheaper technology." Pet.App.27a. If, however, industry could bear the cost of technology saving "at least 102 fish," then EPA could not choose the cheaper technology saving at most

only 101 fish, whatever the difference in cost. Pet.App.27a–28a.

Second, the court of appeals reasoned that the phrase "best technology available for minimizing adverse environmental impact" is inherently inconsistent with cost-benefit analysis, and "represents Congress's conclusion that the costs imposed on industry in adopting the best cooling water intake structure technology available (*i.e.*, the best-performing technology that can be reasonably borne by the industry) are worth the benefits in reducing adverse environmental impacts." Pet.App.57a–58a; *see also* Pet.App.23a–28a. The Second Circuit did not attempt to square that "plain meaning" interpretation with the fact that other "best technology" standards under the Act expressly permit *or even require* cost-benefit analysis.

Third, the Second Circuit relied on the fact that §316(b) does not on its face explicitly mention cost-benefit analysis, and essentially extracted from this Court's cases an unprecedented presumption that cost-benefit analysis is forbidden if not expressly authorized:

> [Our] conclusion is further supported by the fact that Congress in establishing BTA *did not expressly permit* the Agency to consider the relationship of a technology's cost to the level of reduction of adverse environmental impact it produces. "When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such on the face of the statute."

Pet.App.25a (emphasis added) (footnote omitted) (quoting *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510 (1981) (hereafter "*American Textile*")).

Applying those principles, the Second Circuit expressed concern that EPA had weighed costs and benefits in rejecting closed-cycle cooling as BTA for all Phase II facilities. Pet.App.28a–33a. The court remanded this aspect of the rule because, in the court's estimation, it was unclear on the record whether EPA had incorrectly "construed the statute to permit cost-benefit analysis," had "misunderstood or misapplied cost-effectiveness analysis," or had "simply failed either to perform the required analysis or to explain adequately a decision that was within its authority to make." Pet.App.36a–37a. The court also remanded the Phase II performance standards derived from EPA's selection of BTA, acknowledging that "EPA may ... set performance standards as ranges," but expressing concern that the chosen ranges do not require Phase II facilities "to achieve as much reduction of adverse environmental impacts as technologically possible." Pet.App.38a, 43a.

In addition, the Second Circuit invalidated the rule's provision authorizing site-specific determinations of BTA based on a cost-benefit test. Pet.App.56a–60a. The court held that "[j]ust as the Agency cannot determine BTA on the basis of cost-benefit analysis, it cannot authorize site-specific determinations of BTA based on cost-benefit analysis." Pet.App.58a. It further reasoned that site-specific cost-benefit analysis would "impermissibly authorize[] the EPA to consider the degraded quality of waterways in selecting a site-specific BTA," which the court believed to be inconsistent with the general policy of the Act. *Id.*

Citing the extent of the rule's provisions affected by the Second Circuit's decision, EPA subsequently suspended the Phase II rule. 72 Fed. Reg. 37,107 (July 9, 2008) (formal notice following memorandum suspending rule).

SUMMARY OF ARGUMENT

The Second Circuit held that §316(b) of the Clean Water Act requires EPA to mandate the height of current technology for reducing impingement and entrainment of aquatic organisms by cooling water intake structures, without regard to costs, so long as that technology will save at least a few more fish and the costs will not cripple the entire industry. The Second Circuit's radical interpretation must be rejected, for several reasons.

First, the Second Circuit relied on a presumption, drawn from a misunderstanding of this Court's opinion in *American Textile*, that cost-benefit analysis may be considered only if expressly authorized by Congress. There is no such clear statement rule, and it makes no sense to start from a presumption that Congress would prefer agencies not to weigh costs and benefits when implementing statutes. If anything, the usual presumption should be the opposite. Congress does not ordinarily intend that its statutes be implemented in ways that do more harm than good. And EPA's consideration of costs and benefits under §316(b) reflects 30 years of agency practice.

Second, §316(b)'s language authorizes EPA to consider costs in relation to benefits, particularly when §316(b) is placed in its broader statutory context. The phrase "best technology available for minimizing adverse environmental impact" delegates enormous

discretion to EPA. The "best" technology "*for* minimizing" an effect is not necessarily the one that reduces that effect as much as possible (*i.e.*, the best *at* minimizing). As even the Second Circuit acknowledged, the word "available" necessarily requires some judgment about what is economically reasonable. And "minimize" does not necessarily mean "eliminate to the maximum extent feasible;" it frequently just means "reduce."

Section 316(b) also cross-references the standard-setting process under §§301 and 306 for the Act's various other "best technology" standards. The Second Circuit thought that the §316(b) standard should be interpreted consistently with the strictest BAT standard under §301, which governs the most toxic pollutants and which the court of appeals wrongly believed forbids cost-benefit analysis. In fact, the provisions implementing BAT expressly authorize EPA to "take into account ... the cost of achieving such effluent reduction" as well as "such other factors as the Administrator deems appropriate." 33 U.S.C. §1314(b)(2)(B). EPA is at least authorized, and in some cases required, to weigh costs against benefits when setting *every* technology standard under the Act. Moreover, it is far from clear that BAT is the appropriate analogy for a standard governing water intakes. *See* UWAG Br. at 11-15, 45-47.

The Second Circuit's interpretation also leads to results that Congress could not possibly have intended, and that come perilously close, at least, to absurdity. If facility-specific cost-benefit considerations must be ignored in determining the ideal "location, design, construction, and capacity" for an intake structure, EPA must shut its eyes to the fact that, for example, a

particular facility impinges mostly dead fish or nuisance fish that federal and state regulators *want* to eliminate. Likewise, EPA would have to ignore that losses caused by the facility are so small in relation to the size and health of the relevant fish population that the most cautious regulator would consider them trivial. These facts clearly are relevant to any decision about whether "adverse environmental impacts" exist and have been minimized, yet the Second Circuit's decision would require they be ignored.

Finally, the statute is at a minimum ambiguous on these issues. EPA's interpretation of the Act "is entitled to considerable deference; and to sustain it, [the Court] need not find that it is the only permissible construction ... but only that EPA's understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA." *Chem. Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 125 (1985). EPA (and the states that implement the vast majority of permitting programs) have reasonably interpreted this statute for more than 30 years to permit cost-benefit analysis. That interpretation has been upheld by the courts and implemented in countless permitting decisions, and has never been questioned by Congress despite multiple amendments to the Act. *See* UWAG Br. at 15-16, 37-41.

ARGUMENT

I. THE SECOND CIRCUIT'S NEW CLEAR STATEMENT RULE FOR COST-BENEFIT ANALYSIS IS CONTRARY TO PRECEDENT AND MUST BE REJECTED

In proscribing EPA from weighing costs and

benefits to determine BTA at the national and site-specific level, the court of appeals relied on a presumption, drawn from its interpretation of this Court's pre-*Chevron* decision in *American Textile*, that cost-benefit analysis must be unambiguously authorized by Congress. The Second Circuit's clear statement rule is based on a misreading of *American Textile*, clearly outdated in light of *Chevron* and its progeny, and unsound as a matter of policy and reasonable inferences about congressional intent.

A. The Second Circuit's Clear Statement Rule For Cost-Benefit Analysis Is Inconsistent With This Court's Precedent

In *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843–44 (1984), this Court made clear that when a statute "is silent or ambiguous with respect to the specific issue," a court "may not substitute its own construction of [the] statutory provision for a reasonable interpretation made by the administrator of an agency" responsible for its implementation. Instead, "[whenever] there is statutory ambiguity and the agency's interpretation is reasonable, its interpretation must receive deference." *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 46 (2002). In this case, however, the Second Circuit concluded that cost-benefit analysis is prohibited unless explicitly authorized, based solely on this Court's statement in *American Textile* that "'[w]hen Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute.'" Pet.App.25a (quoting *Am. Textile*, 452 U.S. at 510).

Neither the quoted language from *American*

Textile, nor the decision as a whole, can bear the weight placed on them by the Second Circuit. *American Textile* addressed an industry claim that the Occupational Safety and Health Act ("OSHA") was *required* to conduct a cost-benefit analysis when implementing worker safety standards that required the Secretary of Labor, "in promulgating standards dealing with toxic materials or harmful physical agents ... [to] set the standard which most adequately assures, to the extent feasible ... that *no employee will suffer material impairment* of health or functional capacity." 29 U.S.C. §655(b)(5) (emphasis added). Of course that statute—which protects human health and would not allow a single worker to be exposed to a preventable material impairment—specifies a regulatory goal far more stringent and specific than §316(b)'s direction that EPA "minimiz[e] adverse environmental impact." Regardless, in the passage the Second Circuit focused on, this Court simply observed that a court should look to the face of a statute to determine whether Congress "*intended*" to require the agency to engage in cost-benefit analysis—in other words, whether cost-benefit analysis is *required*, not whether it is *permitted*. 452 U.S. at 510 (emphasis added). That is a straightforward, uncontroversial statement of interpretive principle fully consistent with *Chevron*.

The rest of this Court's opinion in *American Textile* confirms that this Court only addressed the question whether cost-benefit analysis was *required* by that statute. For instance, this Court stated that "[t]he principal question presented in these cases is whether [OSHA] *requires* the Secretary ... to determine that the costs of the standard bear a reasonable relationship to its benefits," and echoed that it was "faced with the

issue whether the Act *requires* OSHA to balance costs and benefits." *Am. Textile*, 452 U.S. at 506, 509 n.29 (emphasis added). Likewise, in explaining its holding, this Court twice stated that it was "reject[ing] the argument that Congress *required* cost-benefit analysis." *Id.* at 512 (emphasis added); *see also id.* at 509 ("cost-benefit analysis by OSHA is not *required* by the statute") (emphasis added). Indeed, in an unrebutted characterization of the majority opinion, Justice Rehnquist in dissent read the opinion as having plainly "suggest[ed] ... that the Act *permits* the Secretary to undertake [cost-benefit] analysis if he so chooses." *Id.* at 544 (Rehnquist, J., dissenting).[8]

Unsurprisingly, therefore, this Court has never ascribed to *American Textile* the meaning given it by the Second Circuit. Nor has any other court of appeals. To the contrary, most circuit courts have concluded that "*American Textile* would seem to be limited to the finding that ... the agency is not *required* to employ cost-benefit analysis,"[9] and that, under *Chevron*,

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[8] Even assuming this language in *American Textile* had the meaning ascribed to it by the Second Circuit, it is inconsistent with this Court's subsequent decision in *Chevron* and cannot survive it. Under *Chevron*, statutory silence is read not as a prohibition, but as delegating the decision to the agency. This principle holds equally true for cost-benefit analysis as any other issue. *See* Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 Mich. L. Rev. 1651, 1684–85 (2001) ("If Congress has not ... referred to costs, it will often be because Congress ... has not resolved the question whether costs should be considered. And if this is so, the agency is entitled to consider costs if it chooses.").

[9] *NRDC v. EPA*, 824 F.2d 1146, 1159 n.6 (D.C. Cir. 1987) (en banc) (emphasis added). The First Circuit has similarly observed that *American Textile* "held only that the statute ... did

agencies are free to weigh costs and benefits in the face of statutory silence or ambiguity.[10] The few circuit courts that have read *American Textile* to prohibit cost-benefit analysis in the OSHA context have emphasized the specific and inflexible worker safety goal set by the statute.[11]

Similar statutory language explains this Court's decision in *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001), which considered EPA's authority to consider costs under §109(b)(1) of the Clean Air Act, 42 U.S.C. §7409(b)(1). That provision requires EPA to set air quality standards that are "'requisite to protect the public health'" with "'an adequate margin of safety.'" 531 U.S. at 465 (citation omitted). This Court held that the language in §109(b)(1) plainly requires EPA to set the minimum standards "requisite" to achieve that goal, and that costs were irrelevant. *Id.* This Court observed that some further "textual commitment of

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not *require* ... cost/benefit analysis." *Massachusetts v. Hayes*, 691 F.2d 57, 61 n.4 (1st Cir. 1982).

[10] *See, e.g., Michigan v. EPA*, 213 F.3d 663, 678 (D.C. Cir. 2000) ("preclusion of cost consideration requires ... express congressional direction"), *cert. denied*, 532 U.S. 904 (2001); *Sierra Club v. EPA*, 375 F.3d 537, 541 (7th Cir. 2004) ("when the statute is ambiguous the EPA is free to take costs into account"); *Sierra Club v. EPA*, 314 F.3d 735, 744 (5th Cir. 2002) ("[agency] determinations based on a cost/benefit analysis are within the EPA's discretion unless the statutory scheme precludes such a determination"); *George E. Warren Corp. v. EPA*, 159 F.3d 616, 623–24 (D.C. Cir. 1998); *BP Exploration & Oil, Inc. v. EPA*, 66 F.3d 784, 796 (6th Cir. 1995); *Consol. Rail Corp. v. United States*, 855 F.2d 78, 85–86 (3d Cir. 1988).

[11] *See, e.g., Nat'l Grain & Feed Ass'n v. OSHA*, 866 F.2d 717, 730 (5th Cir. 1989); *Bldg. & Constr. Trades Dep't, AFL-CIO v. Brock*, 838 F.2d 1258, 1264 (D.C. Cir. 1988).

authority" would be necessary to authorize cost-benefit analysis, particularly since the standards set under this provision "are the engine that drives nearly all of Title I of the [Clean Air Act]" and Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Id.* at 468. This Court's discussion of a "textual commitment of authority" to consider cost was not intended to apply—and has never been applied by this Court—more broadly than with respect to that provision. To the contrary, this Court distinguished several court of appeals decisions finding "authority for the EPA to consider costs" under other provisions of the Clean Air Act, even though those provisions did not expressly provide for cost-benefit analysis. *See id.* at 469 n.1.

B. The Second Circuit's Clear Statement Rule Is Unsound And Should Be Rejected

The Second Circuit's clear statement rule not only lacks precedential support, it makes no sense. Cost-benefit analysis by agencies is *favored* by the law, not disfavored.[12] In the absence of strong contrary

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[12] It is worth contrasting the Second Circuit's clear statement rule with the presumption this Court employs in the context of the federal courts' remedial powers. Under traditional principles of equity, a court considering whether to grant injunctive relief must consider, *inter alia*, whether the "balance of hardships" favors the plaintiff. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). This largely entails an informal weighing of costs and benefits. *See, e.g., Walgreen Co. v. Sara Creek Prop. Co.*, 966 F.2d 273, 275 (7th Cir. 1992) (Posner, J.) ("The choice between remedies requires a balancing of the costs and benefits of the alternatives."). This Court has repeatedly held that statutes should be interpreted to permit (or even require) a court to weigh the traditional equitable factors when tailoring

evidence, the most reasonable presumption is that Congress intended to authorize it. Indeed, there are strong reasons for this Court to adopt a presumption or clear statement rule that is the *opposite* of the one employed by the Second Circuit. The Second Circuit's clear statement rule would undermine agency efforts to engage in the reasoned decisionmaking required by general principles of administrative law.

At a basic level, what respondents and the Second Circuit denigrate as "cost-benefit analysis" is nothing more than common sense—the imperative of basic rationality to ensure that actions do more good than harm. And the form employed by EPA here is exceedingly modest. EPA left a substantial thumb on the scale for environmental protection in the national standards, *see* UWAG Br. at 21 (cost-to-benefit ratio), and determined that cost considerations would moderate its BTA determinations on a site-specific basis only if the incremental costs of a particular technology or design are "*significantly* greater than" the incremental benefits. *See supra* at 3, 15. In the absence of clear direction, there is no reason to presume that Congress would want its statutes interpreted in a manner that does significantly more harm than good, and no policy reason for the law to prefer such an outcome.

In fact, "[f]or twenty-five years, American presidents have compelled administrative agencies to complete a cost-benefit analysis before enacting major rules and regulations." Stephen Clowney, Note,

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enforcement measures, unless a contrary purpose plainly appears. *See, e.g., Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–14 (1982) (no contrary purpose in CWA); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987); *eBay*, 547 U.S. at 391–92.

Environmental Ethics & Cost-Benefit Analysis, 18 Fordham Envtl. L. Rev. 105, 106 (2006); *see also, e.g.*, Matthew D. Adler, *Risk, Death & Harm: The Normative Foundations of Risk Regulation*, 87 Minn. L. Rev. 1293, 1389–90 (2003). That is unsurprising, for, other than in those rare cases where Congress has expressly prohibited a weighing of costs and benefits, it may be arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. §706(2), for an agency to promulgate a rule without doing so. "[A]ny reasonable judgment will ordinarily be based on some kind of weighing of costs and benefits, not on an inquiry into benefits alone." *Cost-Benefit Default Principles* at 1694, *supra* at 26 n.8; *see also id.* at 1668 ("Unless Congress has clearly said otherwise, agencies will be expected to balance costs against benefits in issuing regulations.").

EPA, like other agencies and in coordination with other agencies, must implement discrete statutory provisions in light of multiple regulatory goals that place competing demands on administrative and industry resources and, in some instances, may conflict. In *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 85 (2002), this Court recognized "the substantive choices that agencies are expected to make when Congress leaves the intersection of competing objectives both imprecisely marked but subject to administrative leeway." And in the landmark *Chevron* decision, this Court observed that agencies frequently must make "policy choices" to reconcile "the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." 467 U.S. at 865–66; *see*

also ICC v. Or. Pac. Indus., Inc., 420 U.S. 184, 193 n.2 (1975) (Powell, J., concurring) (agencies "mak[e] ... decision[s] reasonably accommodating diverse and often competing public interests"). A weighing of costs and benefits preserves resources for competing priorities and provides a framework for managing conflicting policies.

Finally, site-specific determinations grounded in cost-benefit balancing, such as the one included in the Phase II rule, help guard against the disruptive effect of a one-size-fits-all regulation. This approach, as noted above, is particularly important for existing facilities, which are more technically, physically, and geographically constrained than new facilities. *See supra* at 14–15; Pet.App.248a (69 Fed. Reg. at 41,603).[13]

II. THE ONLY REASONABLE INTERPRETATION OF §316(b) PERMITS EPA TO WEIGH COSTS AND BENEFITS AT THE NATIONAL AND LOCAL LEVEL

Once the Second Circuit's unsound clear statement rule is set aside, its radical interpretation of §316(b) must be rejected even at the first step of the *Chevron* analysis. The statutory language is clearly expansive enough to permit a reasonable weighing of costs and benefits. And when the broader structure and

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[13] *See Am. Petroleum Inst. v. EPA*, 661 F.2d 340, 350 (5th Cir. 1981). This flexible approach is critical for regulations involving essential national services, such as power generation. As here, agencies can develop more stringent national standards, secure in the ability to moderate their effects in particular local cases where the costs of compliance would substantially outweigh the benefits. *See supra* at 14–15, 29.

purposes of the statute, traditional canons of construction, and legislative history are considered, it becomes clear that an interpretation authorizing EPA to engage in cost-benefit analysis is the only reasonable reading. *See, e.g., Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007) (at *Chevron* step one, a court "'should not confine itself to examining a particular statutory provision in isolation.' ... Rather, '[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context ....'") (citations omitted) (alteration in original).

A. The Ordinary Meaning Of The Phrase Congress Used In §316(b) Permits Cost-Benefit Analysis

The Second Circuit's conclusion that §316(b) "precludes cost-benefit analysis" (Pet.App.24a), both nationally and on a site-specific basis, is based on what the court believed to be the only literal and therefore reasonable interpretation of §316(b). But even if §316(b) is considered in isolation (and of course it cannot be), the dictionary and common usage point to only one plausible reading of the clause: the "best technology available for minimizing adverse environmental impact" does not have to be the one that impinges or entrains the fewest fish without imposing financial burdens the industry cannot bear.

First, the word "best" means "[m]ost satisfactory, suitable or useful; most desirable." *American Heritage Dictionary* 178 (3d ed. 1992). It often means the superlative of "good," but it also means the most *productive* of good—in the sense of what is optimal for achieving an end result. *Black's Law Dictionary* 160

(6th ed. 1990), for example, defines "best" to mean "[o]f the highest quality; of the greatest usefulness for the purpose intended. Most desirable, suitable, useful, or satisfactory," and goes on to explain:

> For example, the "best bid" of interest by a prospective depository of school funds would not necessarily be the highest bid, but, looking to the solvency of the bidder, the bond tendered, and *all the circumstances surrounding the transaction*, the safety and preservation of the school fund, the "best bid" might be the lowest bid.

Id. (emphasis added).

The word "best" is therefore perfectly consistent with the need to balance multiple, complex goals. Even in the specific CWA context, courts have recognized that the "best" pollution control technology is not necessarily the technology that reduces pollution the maximum amount. "'[T]he CWA's requirement that EPA choose the "best" technology does not mean that the chosen technology must be the best pollutant removal.'" *Citizens Coal Council v. EPA*, 447 F.3d 879, 903 (6th Cir. 2006) (en banc) (quoting *BP Exploration & Oil, Inc. v. EPA*, 66 F.3d 784, 796 (6th Cir. 1995)). Instead, the word "best" is used to characterize standards that "'must be acceptable on the basis of numerous factors, only one of which is pollution control.'" *Id.* (quoting 66 F.3d at 796); *see also E. I. Du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 121 (1977) (for "'best practicable' or 'best available' technology ... [the CWA] refers to §304 for a definition of these terms").

Second, even the Second Circuit recognized that the word "available" gives EPA authority—indeed a mandate—to consider economic costs when selecting BTA. Determining just how absurdly expensive a technology must be before it is no longer realistically "available" calls for a substantial exercise of discretion. The Second Circuit held that EPA could reject technology requirements as "unavailable" only if the costs exceeded the maximum financial burden the industry as a whole could bear. Pet.App.24a. But nothing about the plain meaning of that word limits EPA's consideration of "availability" to the industry's ability to absorb exorbitant costs regardless of the benefit. Congress has repeatedly given "available" a broader meaning in the CWA to allow the balancing of diverse economic, environmental, and technological considerations—including three times using combinations of the words "best," "technology," and available" to create CWA standards that either permit or mandate more robust cost-benefit analysis. *See supra* at 7–11.

Third, the word "minimize" does not always mean "eliminate" or even "eliminate to the maximum extent feasible." "Minimize" frequently just means "reduce." *American Heritage Dictionary* 1150 (3d ed. 1992). If I resolve to "minimize" my gasoline consumption this summer, I am not committing never to drive my car, or to drive my car only in emergencies. I am committing to reduce my gasoline usage by some unspecified amount, implicitly balanced against other goals and values. Similarly, the *American Heritage Dictionary* observes that "[w]hen a manager announces that ['] The company wants to *minimize* the risk of accidents to line workers,['] we naturally interpret the manager as

meaning that the risk is to be reduced to the smallest level consistent with considerations of efficiency and cost"—*"not ... to the lowest level logically possible."* *Id.* (emphasis added and omitted).

Congress has also used "minimize" in contexts where it cannot have intended the Second Circuit's maximalist interpretation. For example, it ordered the executive branch to "minimize the paperwork burden for individuals" and "minimize the Federal information collection burden," but it obviously did not mean to require the elimination of tax forms or background checks for federal employees. 44 U.S.C. §§3501(1), 3504(c)(3). Similarly, in the CWA Congress set a goal of the "drastic minimization of paperwork," but it did not intend to eliminate paperwork to the maximum extent technologically feasible (or, for that matter, for the word "drastic" to be grammatically nonsensical). 33 U.S.C. §1251(f). And in the sparse legislative history of §316(b) itself, Representative Clausen quoted the "minimize" language and then immediately stated that it required only technology that could be implemented at an "economically practicable cost." 118 Cong. Rec. 33,762 (1972); *see supra* at 7. Moreover, interpreting "minimize" as "reduce" is consistent with this Court's usage of the word. *See, e.g., Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 621 (1966) (reasoning that the APA's deferential standards of review "minimize the opportunity for reviewing courts to substitute their discretion for that of the agency," although of course that "opportunity" could be further reduced by even more deferential standards).

Finally, the phrase "adverse environmental impact" is not synonymous with impingement and entrainment but reflects an inherently broad delegation of authority

to EPA to consider what kinds of effects, and at what level, genuinely have an "adverse impact" on the "environment" in a particular context. Nothing in the Clean Water Act establishes a goal of ensuring the survival of every possible fish. To the contrary, the Act in numerous sections (including §316(a), 33 U.S.C. §1326(a)) limits compliance burdens on industry so long as the "protection and propagation of a *balanced population* of shellfish, fish, and wildlife" is assured. 33 U.S.C. §1311(g)(2)(C) (emphasis added); *see also id.* §1311(h)(2), (m)(2); *id.* §1314(a)(5)(A), (a)(5)(B), (*l*)(1)(A); *cf. id.* §1251(a)(2). Even the Act's provisions governing *toxic pollutants* direct EPA to consider "the importance of the affected organisms" in the local ecosystem. 33 U.S.C. §1317(a)(1), (2). The Second Circuit's reading of §316(b) would mandate enormous burdens, without any weighing of costs and benefits, to save as many fish as possible when that objective was never adopted by Congress or EPA.

Thus, the "*best* technology available for minimizing adverse environmental impact" may be the most suitable or desirable technology available for reducing such impact, to whatever extent the decisionmaker believes appropriate in light of competing values. And, based on a balancing of competing values, BTA for "minimizing adverse environmental impact" may not be the one that impinges or entrains the fewest fish. Similarly, Congress did not take the absolutist approach of requiring EPA to "eliminate" any particular impacts associated with intake structures, as it did for pollutant discharges under §§301 and 306. *See* 33 U.S.C. §1311(b)(2)(A) ("national goal of *eliminating* the discharge of *all pollutants*") (emphasis added); *accord id.* §1311(b)(3) (requiring EPA to "identify

control measures ... available to eliminate the discharge of pollutants"); *id.* §1251(a)(1). Congress chose the far more flexible term "minimizing," which allows EPA to determine the degree of reduction appropriate. *Cf. Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 475 (D.C. Cir. 1998) (permitting agency to consider economic impacts where "Congress ... required 'substantial restoration of the natural quiet,' not total restoration"), *cert. denied*, 526 U.S. 1158 (1999).

B. The Structure Of The Act Confirms EPA's Interpretation

If the bare language "best technology available for minimizing adverse environmental impact" leaves any doubt about the permissibility of cost-benefit analysis, it is dispelled by the relationship of §316(b) to other sections of the Act. "A court must ... interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into an harmonious whole.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations omitted). Here, reading §316(b) in the context of the entire CWA—a statute described by this Court as one "in which Congress envisioned, rather than curtailed, the exercise of discretion"—confirms that §316(b) authorizes EPA to compare the costs of technologies to their environmental benefits in selecting BTA. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 316 (1982).

1. Sections 301 And 306 Either Mandate Or Permit Cost-Benefit Analysis

All parties to this case,[14] the Second Circuit, and the other courts of appeals to have considered the issue agree that "best technology available" standard in §316(b) should be interpreted and applied in a manner informed by the "best technology" standards in CWA §§301 and 306. The brevity of §316(b), the linguistic similarity of BTA to the other "best technology" standards, the cross-reference to those other provisions, and the fact that Congress did not separately provide for civil or criminal enforcement of violations of §316(b), *see* 33 U.S.C. §1319, all reinforce the conclusion that Congress intended to incorporate the comprehensive decisional framework established by §§301, 304, and 306. Respondents contend, however, that EPA lacks authority to compare costs and benefits under §301's BAT standard, and that the BTA requirement in §316(b) should be interpreted consistently with this constrained view of BAT.[15]

As an initial matter, respondents' premise is simply incorrect. *All* of the "best technology" standards under

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[14] *See, e.g.*, Riverkeeper Second Cir. Supp. Br. at 50 ("EPA's authority for *considering* compliance costs ... comes from the cross-reference in section 316(b) to sections 301 and 306.") (emphasis added); States Opp. to Cert. at 7–8 (arguing that the Second Circuit properly "rejected the cost-benefit analysis because it was precluded ... by the plain language of the cross-referenced sections").

[15] Environmental respondents have taken conflicting positions on this issue. They previously conceded that in setting national standards EPA "can, and did, consider costs in relation to benefits." Riverkeeper Second Cir. Opening Br. at 93.

§§301 and 306, *including* BAT, authorize EPA to consider costs of compliance as well as environmental benefits. For some of the "best technology" standards, Congress specified that costs were a mandatory "comparison factor." Congress mandated in §304 that EPA's assessment of BPT "include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application." 33 U.S.C. §1314(b)(1)(B). It is undisputed that EPA was *required* to conduct a comparison of costs and benefits when setting BPT. *See, e.g.*, Pet.App.21a; States Opp. to Cert. at 7–8; Riverkeeper Second Cir. Reply Br. at 115. The BCT standard for conventional pollutants—which respondents and the Second Circuit have ignored—similarly requires EPA to evaluate "the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived." 33 U.S.C. §1314(b)(4)(B); *see supra* at 10.

When §§301, 304 and 306 do not *require* cost-benefit analysis as a mandatory "comparison factor," those provisions still expressly grant EPA authority to consider costs and benefits as discretionary "consideration factors." Even under the BAT standard EPA "shall take into account ... the cost of achieving such effluent reduction" as well as "such other factors as the Administrator deems appropriate." 33 U.S.C. §1314(b)(2)(B). The primary difference between the statute's treatment of BPT and BAT is that, under BAT, "[a]ll factors, including costs and benefits, are [discretionary] consideration factors, and no factors are

separated out for [mandatory] comparison." *Weyerhaeuser*, 590 F.2d at 1045.[16]

As the D.C. Circuit has observed, for BAT "Congress did not mandate any particular structure or weight for the many consideration factors," but instead "left EPA with discretion to decide how to account for the consideration factors, and how much weight to give each factor." *Id.* Thus, §304 "on its face lets EPA relate the various factors as it deems necessary." *Id.* at 1046. One obvious—and clearly permissible—way to give costs and benefits weight and "relate" them to each other is to perform a cost-benefit analysis. The "such other factors as the Administrator deems appropriate" language in §304 underscores the broad discretion granted to EPA in determining what technology is "best" in particular contexts. The D.C. Circuit has correctly observed that, because of this language, the CWA provisions "cannot logically be interpreted to impose on EPA a specific structure of consideration or set of weights because it gave EPA authority to 'upset' any such structure by exercising its discretion to add new factors to the mix."[17] *Id.*

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[16] Congress provided a "virtually identical" structure for BADT standards under §306. *Am. Iron & Steel Inst. v. EPA*, 526 F.2d 1027, 1059 (3d Cir. 1975). In setting BADT under §306, Congress required that EPA "shall take into consideration *the cost of achieving such effluent reduction*, and any non-water quality environmental impact and energy requirements." 33 U.S.C. §1316(b)(1)(B) (emphasis added).

[17] *Cf. Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489, 494–95 (1987) (holding that the CWA preempted state nuisance law where the NPDES permit program—the same program through which EPA establishes §316(b) BTA requirements—is designed

Recognizing this significant flexibility, the Sixth Circuit has expressly held that EPA is permitted to use cost-benefit analysis in setting BAT. *BP Exploration*, 66 F.3d at 796. That court endorsed the D.C. Circuit's reasoning that the BAT "consideration factors" give EPA "'discretion to decide how to account for the consideration factors, and how much weight to give each factor'"—and thus to compare costs in relation to benefits. *Id.* (*quoting Weyerhaeuser*, 590 F.2d at 1045). Other circuits have held that cost-benefit analysis is not *required* under the BAT provisions, but until now no court has ever held that such analysis is forbidden.[18] The Second Circuit itself previously understood this statutory structure. In *Riverkeeper I*, it relied on *Weyerhaeuser* and *BP Exploration* to hold that cost-benefit analysis was permissible *under §316(b) itself*. *See* 358 F.3d at 195 (quoting *BP Exploration* and *Weyerhaeuser*).

The court's contrary reading of §§301 and 316(b) in this case rests in part on a misreading of a single sentence in this Court's pre-*Chevron* opinion in *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64 (1980). Pet.App.21a–23a. This Court held in *Crushed Stone* that EPA was not *required* to provide a variance for individual facilities that could not afford to meet BPT effluent standards. This Court reasoned in part that

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for EPA's "weighing of costs and benefits" in establishing effluent limitations, and state law would circumvent those considerations).

[18] *See, e.g.*, *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 559, 563 (D.C. Cir. 2002); *Rybachek v. EPA*, 904 F.2d 1276, 1290–91 (9th Cir. 1990); *Am. Petroleum Inst. v. EPA*, 787 F.2d 965, 972 (5th Cir. 1986); *Reynolds Metal Co. v. EPA*, 760 F.2d 549, 565 (4th Cir. 1985); *CPC Int'l, Inc. v. Train*, 540 F.2d 1329, 1341–42 (8th Cir. 1976); *Am. Iron & Steel Inst.*, 526 F.2d at 1059.

the BPT standards were supposed to reflect the "prescribed minimum technology," and that the statute already required EPA to weigh costs against benefits when setting those standards. 449 U.S. at 76–77. When distinguishing the BAT provisions, which include a variance for individual plant economic affordability, this Court observed that "in assessing BAT total cost is no longer to be considered in comparison to effluent reduction benefits." *Id.* at 71. But this Court clarified that the BAT provision "lists 'cost' as a factor to consider in assessing BAT, although it does not state that costs shall be considered in relation to effluent reduction." *Id.* at 71 n.10. In other words, Congress made cost-benefit analysis *mandatory* for BPT but only optional for BAT—which helped justify deference to EPA's distinction between the two. This Court certainly did not hold that EPA was *forbidden* from considering costs in setting BAT standards, as subsequent courts have recognized. *See Tex. Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 936 (5th Cir. 1998) ("EPA is *not obligated* to evaluate ... the relationship between costs and benefits" under BAT) (emphasis added) (citing *Crushed Stone*, 449 U.S. at 71).

2. The Second Circuit's Rigid Analogy To BAT Standards Is Inappropriate

Even if this Court were to conclude that §§301 and 304 of the CWA place significant constraints on EPA's discretion to consider costs when setting BAT standards, there is no sound basis for importing those constraints into §316(b). This Court has recognized that even though the CWA imposes "absolute" requirements in certain contexts, overall it "is a statute in which Congress envisioned, rather than curtailed,

the exercise of discretion." *Weinberger*, 456 U.S. at 316 & n.11 (distinguishing constraints recognized in *Crushed Stone* and holding that CWA violations do not necessarily require injunctive relief).

As EPA recognized in the Phase II rule when distinguishing §316(b) from the effluent limitation provisions, "the object of the 'best technology available' [in §316(b)] is explicitly articulated by reference to the receiving water: To minimize adverse environmental impact in the waters from which cooling water is withdrawn." Pet.App.157a (69 Fed. Reg. at 41,583). The BAT standard has the very different statutory goal of "eliminating the discharge of all pollutants." 33 U.S.C. §1311(b)(2)(A). The content of each CWA technology standard is necessarily tied to the statutory goal it is intended to advance. *See Crushed Stone*, 449 U.S. at 77 (recognizing the close relationship between the technology standard and the statutory goal, where the variance sought would have "allow[ed] a level of pollution inconsistent with the judgment of the Administrator"); *id.* at 75 n.14.

The Second Circuit focused on BAT because of its superficial "linguistic similarity" with BTA, but failed to recognize the important differences in the phrasing, purpose, and regulatory context of those two standards. Even if the Second Circuit were correct that Congress intended for BAT standards to be "technology-forcing" in some sense, §316(b) embodies no comparable policy.

Congress's amendments to §301 also illustrate the flaw in the Second Circuit's conflation of BTA with the BAT standard. The Second Circuit assumed that the original Act's scheduled shift from BPT to BAT

signaled an intent by Congress to elevate technological performance above all else. Pet.App.21a, 24a. But that ignores the subsequent history of the Act, under which Congress substantially modified §301 to make the BAT standard applicable to a much narrower range of effluents. *See supra* at 9–11. Under the 1977 amendments, so-called "conventional" pollutants need only comply with the BCT standard, which affirmatively *requires* EPA to weigh "the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived." 33 U.S.C. §1314(b)(4)(B). Congress also added §301(g), which permits EPA to exempt some non-conventional, non-toxic pollutants from the BAT standard and regulate them under the even less stringent BPT standard. *See* 33 U.S.C. §1311(g)(2)(A).

After the 1977 and 1987 amendments, the BAT standard is principally confined to the regulation of potentially lethal toxic pollutants discharged into the Nation's waters. 33 U.S.C. §1362(13) (toxic pollutants are those "which after discharge and upon exposure ... will ... cause death," among other serious harms). Other pollutants are eligible for consideration under standards *requiring* a weighing of costs and benefits. *See supra* at 7–11. Under the Second Circuit's reading, EPA therefore must analyze impingement and entrainment under a standard that Congress thought too stringent for the release of *pollutants* that pose risks to *human health*, let alone to fish. The Second Circuit's assumption that Congress would have wanted that standard to be applied to cooling water intake structures in a rigid and "technology-forcing" way, even though the statute now permits variances from

BAT even for toxic pollutants in certain circumstances, is simply unreasonable.

That risks to fish from impingement and entrainment are poorly analogized to toxic and other dangerous pollutants is further confirmed by Congress's decision to place cooling water intake structure requirements in §316, which generally deals with the more modest risks posed by *thermal* pollution. Thermal discharges are generally regulated as a non-conventional, non-toxic pollutant subject to the discretionary variance provision of §301(g) and a special variance provision in §316(a), 33 U.S.C. §1326(a). The §316(a) variance requires EPA to relax its regulations for a particular facility if the facility shows that the regulations are "more stringent than necessary to assure the projection [protection] and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water into which the discharge is to be made." 33 U.S.C. §1326(a).

Indeed, to the extent that §316(b) might be viewed as principally concerned with the protection of fish (even though, of course, "minimizing adverse environmental impact" is much broader), Congress has never extended to risks to individual fish the same level of concern it has displayed for pollutants dangerous to humans. Given the care with which Congress structured the entire Act to ensure that disproportionate expenditures are not required to protect aquatic life, see *supra* at 7–11, 36, it strains credulity to imagine that it would have opened the door, through a provision that the Second Circuit twice characterized as an "afterthought," to regulations requiring massive expenditures on behalf of fish for no

appreciable benefit.[19] Such a reading of §316(b) would inappropriately "alter the fundamental details of a regulatory scheme in ... [an] ancillary provision[]." *Am. Trucking*, 531 U.S. at 468; *supra* at 27–28. And, as this Court has repeatedly cautioned, Congress does not "hide elephants in mouseholes." *Am. Trucking*, 531 U.S. at 468.

3. The Water Quality Policies Of The Act Do Not Support The Second Circuit's Rejection Of Cost-Benefit Analysis

The Second Circuit also reasoned that any effort to weigh costs and benefits on a site-specific basis would inevitably draw permitting authorities into "consideration of the quality of the receiving water," which the court believed would be inconsistent with the broader policies of the Clean Water Act. Pet.App.56a–60a. The Second Circuit's reservations about site-specific cost-benefit analysis are misplaced.

The plain language of §316(b) strongly suggests that BTA should be determined at the facility level, particularly for existing facilities. It is hard to imagine

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[19] For example, the Second Circuit's reading would require a radically and arbitrarily different approach to the effects of a cooling system's intake and its outflow. Under §316(a), harm to individual fish from the thermal discharges of a "once-through" cooling system may be disregarded so long as the discharge does not threaten the protection and propagation of a balanced population of fish. Under the Second Circuit's reading of §316(b), however, such a facility might nonetheless be required to rip out that same cooling system and replace it with, *e.g.*, a wet closed-cycle system, based solely on a showing that it would save some extra fish, without any showing that the impingement or entrainment of those fish threatens a balanced population.

how the optimal "location" or even "design, and construction" of cooling water intake structures could be specified at a national level, without regard to the geographic and waterbody characteristics at particular facilities. *See* Pet.App.157a (69 Fed. Reg. at 41,583) (EPA discussing consideration of "effects on and benefits to" the local waterbody); Pet.App.229a (69 Fed. Reg. at 41,599 (explaining that "[b]ecause different waterbody types have the potential for different ... impacts, the requirements ... vary by waterbody type.").[20] And, as explained in greater detail in the brief filed by UWAG, both the costs and the environmental benefits of particular intake structure technologies can vary dramatically from facility to facility. *See* UWAG Br. at 6-11. In at least some cases, the only sensible way to identify the "best" available technology will be to weigh costs and benefits in a site-specific manner.

The Second Circuit appears to be concerned that it would be inappropriate for a permitting authority to conclude that the costs of a better intake technology significantly outweigh the benefits only because the waterbody is already artificially degraded from its natural state in a manner that a better intake system might have helped to remedy. Pet.App.58a–59a. Even

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[20] Perhaps for this reason, §316(b), unlike the effluent discharge requirements in §§301 and 306, does not require that facilities "implement" a particular technology, but only that the "the location, design, construction, and capacity of cooling water intake structures *reflect*" that technology. That structures "reflect" a technology is a far more ambiguous mandate than one requiring that facilities "implement" that technology, and one with ample room for variations and alternative requirements where justified by local circumstances.

if such concerns were valid they do not remotely justify precluding site-specific cost-benefit analysis altogether, including appropriate consideration of site-specific waterbody characteristics. The Second Circuit's reasoning would require EPA to close its eyes to the fact that some waterbodies *naturally* support ecosystems that are robust, or abnormally meager, enough to affect the "best" choice of intake technology.

The Second Circuit also reasoned that site-specific cost-benefit analysis is inappropriate because §316(a) explicitly authorizes variances from thermal discharge limitations if those limits "will require effluent limitations more stringent than necessary to assure the projection [protection] and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water into which the discharge is to be made"—whereas §316(b) contains no similar language. *See* 33 U.S.C. §1326(a), (b); Pet.App.59a n.27. That reasoning is flawed. While §316(b) does not explicitly contain a variance procedure, it directs regulators to consider the "impact" of the "location, design, construction, and capacity" of cooling water intake structures. 33 U.S.C. §1326(b). As explained above and in UWAG's brief, this analysis inherently calls for some consideration of site-specific issues. *See supra* at 14–15; *see* UWAG Br. at 6-11, 42-57.

In any event, EPA's authority to weigh costs and benefits at the site-specific level need not be grounded in a single provision, but may reflect the Agency's inherent authority to select "a mechanism for ensuring that its necessarily rough-hewn categories do not unfairly burden atypical plants." *Chem. Mfrs.*, 470 U.S. at 120 (affirming EPA's authority to "temper[] with flexibility" otherwise categorical pretreatment

standards); *Du Pont*, 430 U.S. at 128 (1977) (concluding that BPT and BAT limitations may "be set by [national] regulation" "so long as some allowance is made for variations in individual plants, as EPA has done").

C. The Second Circuit's Interpretation Has Consequences Congress Could Not Have Intended

For all of the reasons given above, it is simply not plausible that Congress intended to mandate the maximum possible reduction in impingement and entrainment without allowing EPA to balance costs against benefits. Indeed, such an interpretation of the Act flirts with absurdity.

First, a campaign to eliminate impingement and entrainment of fish, to the maximum extent possible without regard to cost, is self-evidently unsound policy. Although EPA chose reductions in impingement mortality and entrainment as a "convenient" metric for determining performance at Phase II facilities (Pet.App.290a, 169a (69 Fed. Reg. at 41,612, 41,586)), neither the statutory language nor sound environmental policy justify the Second Circuit's fixation on saving every possible fish. Fish and other aquatic creatures often produce many thousand times more offspring than the available ecosystem resources can support, expecting high natural mortality in the early life stages.[21] Moreover, when a waterbody is

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21 *See, e.g., Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 309 (1st Cir. 1979) (noting that "[t]hough the intake would act as an additional large predator, there are other more dangerous threats in the natural environment, which fish are able to survive because they are highly fecund. For instances,

either highly robust or naturally lacking aquatic life that is susceptible to impingement or entrainment (like the Dead Sea or the Great Salt Lake), moderate levels of impingement and entrainment may have no consequences for the marine ecosystem that are remotely worth massive technology costs. The Second Circuit's interpretation would compel EPA to order refits that are enormously expensive symbolic gestures devoid of any meaningful environmental consequence.

Second, the Second Circuit's interpretation also presumably requires EPA to require intake designs and construction methods that eliminate, to the maximum extent possible, *all* "adverse environmental impact," so long as the industry can reasonably bear the costs. Pet.App.26a. As explained above, "adverse environmental impact" encompasses far more than impingement mortality and entrainment, and may also include the fogging, icing, consumptive water usage, and noise associated with closed-cycle cooling, as well as increased air emissions from greater fuel consumption. *See supra* at 5–6. Indeed, it could extend to "impacts" such as atmospheric carbon dioxide produced in the manufacturing and transporting of building materials used in the "construction" of intake structures. Congress could not have intended to require EPA to consider, and reduce to the maximum extent possible, every far-flung environmental impact associated with the design and construction of a cooling water intake structure *while intentionally blinding*

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individual female winter flounder produce about 500,000 eggs annually and rainbow smelt produce between 25,000 and 50,000.") (citation omitted).

itself to whether the costs significantly exceed the benefits.

Third, the cost burdens imposed by the Second Circuit's interpretation are potentially limitless in light of EPA's decision to implement §316(b) through the NPDES permitting process, which operates on a five-year cycle.[22] As new technologies are developed, it is possible—indeed likely—that the maximally-effective technology may change over the course of a permitting cycle. This is problematic because cooling water intake structures often require tons of concrete and steel in the ground or underwater.[23]

Moreover, both the type of cooling system and the amount of cooling water used affect a facility's layout and operation, not to mention energy output. Yet, under the Second Circuit's interpretation of §316(b) and the Phase II rule, EPA and state permitting authorities presumably would have to reevaluate such structures every five years, then mandate any new improvements that will significantly reduce impingement mortality and entrainment—without regard to the aggregate costs of such a fickle regulatory policy (as long as the industry can bear them), or any facility-specific difficulties in implementation (such as if the ideal location for a state-

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[22] Congress did not specify any permitting process for §316(b), and there are good reasons to believe it intended for §316(b) requirements to be implemented only once, at a facility's initial construction. *See supra* at 12 n.4. This Court elected not to review that issue.

[23] The structure considered by the First Circuit 30 years ago in *Seacoast*, for example, involved piping structures drawing seawater from over a mile out in the ocean. 597 F.2d at 309.

of-the-art intake is occupied by other vital facility infrastructure). *Cf.* 33 U.S.C. §1316(d) (new facilities, but not existing facilities, are protected from more stringent effluent standards for 10 years). Besides the exorbitant costs, retrofits are extremely time-consuming, potentially resulting in facilities being taken offline for significant periods of time, with obvious consequences for the stability of electric supplies. J.A.312; J.A.343–44; Pet.App.258a-59a (69 Fed. Reg. at 41,605). There is no evidence in the language or history of §316(b) indicating that it was meant to require such a Sisyphean task.

Congress cannot possibly have intended these results. Since the language is easily broad enough to encompass consideration of costs as well as benefits, and the overall language, structure, and legislative history of the Clean Water Act reflect a strong commitment to cost-benefit analysis rather than hostility to it, the Second Circuit's extreme reading of this one isolated provision is clearly inappropriate. Indeed, the reading is so absurd as to require its rejection even if the plain language did—though it does not—appear to require it. *See, e.g., Logan v. United States*, 128 S. Ct. 475, 484 (2007) ("Statutory terms ... may be interpreted against their literal meaning where the words 'could not conceivably have been intended to apply' to the case at hand." (citation omitted)); *Pub. Citizen v. U.S. DOJ*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring in the judgment) (such a rule "demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way").

D. The Legislative History Confirms That §316(b) Permits Cost-Benefit Analysis

The absence of any congressional intent in §316(b) to force technology irrespective of costs and benefits is confirmed by the Act's legislative history. Representative Clausen, a Floor Manager, explained that "'best technology available' is intended to be interpreted to mean the best technology available commercially at an economically practicable cost." *See supra* at 7.

The legislative history of the thermal discharge provisions of §316 reflects a similar congressional understanding that EPA (and state regulators) would weigh the costs of any implementing regulations against the benefits of such technology forcing to fish and other wildlife. In discussing Congress's goal in enacting §316, Representative Clark—a member of the House Committee on Public Works and sponsor of the amendment to H.R. 11896 relating to thermal discharges—stated:

> [T]he [EPA] Administrator has shown an unfortunate tendency sometimes in the past to require ridiculous expenditures of hundreds of millions of dollars with no benefit to any persons, or even to the fish. The purpose of the language in sections 304, 306, *and 316* is to require the Administrator to utilize better judgment in the future.

118 Cong. Rec. 33,765–66 (1972) (emphasis added).

Conference managers from both the House and Senate also recognized that the bill would not fulfill its

objectives if it imposed unreasonable costs. Senate Debate on S. 2770 (Nov. 2, 1971), *reprinted in* 2 Legislative History of the Water Pollution Control Act Amendments of 1972, at 1272 (Comm. Print 1973) ("Legis. Hist.") (statement of Sen. Randolph, Chairman of the Conference Committee and Chairman of the Committee on Public Works) ("under the proposed legislation, controls must relate the economic and social benefits to be gained with the economic and social costs to be incurred"). As explained by Senator Bentsen:

> If these programs cause too severe economic dislocations, if the economic and social benefits of pollution control programs bear no reasonable relationship to the costs involved in implementing them, then all of our best efforts to clean up the waterways could be defeated in a backlash against those of us who are working to clean up the environment.... *There must be a reasonable relationship between costs and benefits* if there is to be an effective and workable program.

Id. at 1281 (emphasis added); *see also id.* at 1278 (statement of Sen. Montoya, member of the Committee on Public Works) ("I would point out ... that the bill will allow reason to be applied when the benefits of attaining clean water are clearly and significantly out of line with the costs involved ....").

III. AT A MINIMUM, §316(b) IS AMBIGUOUS AND EPA'S INTERPRETATION IS REASONABLE AND ENTITLED TO DEFERENCE

As explained above, the only reasonable reading of §316(b) is that the statute expressly delegates to EPA discretion to consider the relationship between costs and benefits when selecting the "best technology available for minimizing adverse environmental impact." At worst, however, the statute is ambiguous or silent on this critical point, particularly considering the broader statutory context.[24] Indeed, the Second Circuit essentially conceded that the statute was at least ambiguous; rather than stopping at step one of *Chevron*, it held that EPA's interpretation "was not 'based on a permissible construction of the statute'" Pet.App.36a (quoting *Chevron*, 467 U.S. at 843). EPA's construction of the statute is plainly reasonable, and entitled to deference.

First, respondents and the Second Circuit have conceded that §316(b) permits consideration of costs in some manner. They have simply attempted to impose exceptionally detailed and cramped restrictions on exactly *how* EPA may analyze costs under §316(b). For example, if EPA had determined that industry could "reasonably bear the price of technology" that saves 100-105 fish, the Second Circuit would allow EPA

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[24] *See Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 127 S. Ct. 1534, 1546 (2007) ("'[A]mbiguity is a creature not [just] of definitional possibilities but [also] of statutory context.") (citation omitted) (final two alterations in original); *Brown & Williamson*, 529 U.S. at 132 ("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.").

to choose as BTA a technology that saves 99-101 fish for $100 instead of one that saves 100-103 fish but costs 50% more ($150) for this incremental benefit. Pet.App.27a–28a. But EPA could *not* choose the cheaper technology saving up to 101 fish if it had first determined that the industry could bear the price of technology that could save "at least 102 fish." Pet.App.28a. In essence, respondents and the Second Circuit believe that §316(b) affirmatively authorizes the consideration of costs, but drastically constrains how EPA may *weigh* this criterion—unlike all other "consideration factors" under the CWA. As the United States has explained, the Second Circuit's holding would "micro-manage the agency's decisionmaking by establishing rules that cannot be found anywhere in the Act." U.S. Opp. to Cert. at 12.

Second, in the absence of statutory language clearly signaling congressional disapproval, cost-benefit analysis is *always* reasonable. Cost-benefit analysis (and particularly the modest form employed by EPA here) is essentially just another way of describing common sense or basic rationality. *See supra* at 26–31 & n.10. Assuming from §316(b)'s *ambiguous* language that Congress did not intend for its efforts to do more harm than good is, at a minimum, a permissible interpretation. *See, e.g., Arkansas v. Oklahoma*, 503 U.S. 91, 105, 107 (1992) (reversing where CWA did not limit EPA's authority on a permitting question and EPA's interpretation was a "reasonable exercise of [its] substantial statutory discretion").

Third, where an agency's interpretation "closely fits 'the design of the statute as a whole,'" courts "should be especially reluctant" to reject it. *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417–18 (1993) (citation

omitted). The Act clearly grants EPA significant authority to consider costs and to provide reasonable variances even in the context of toxic pollutants. *See supra* at 7–11. When it mentions fish at all, it consistently expresses a policy of protecting balanced populations of fish—not, as the Second Circuit assumed, *individual* fish. EPA's interpretation of §316(b) as permitting a weighing of costs and benefits in setting national BTA standards, as well as with site-specific determinations based on further cost-benefit analysis at the local level, is reasonable and consistent with the Act's approach towards the protection of fish. The Second Circuit's approach, conversely, places fish and other aquatic organisms on a pedestal never erected by Congress.

Finally, this Court "'normally accord[s] particular deference to an agency interpretation of "longstanding" duration,' recognizing that 'well-reasoned views' of an expert administrator rest on 'a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 487 (2004) (citations omitted). The long-standing nature of EPA's reliance on cost-benefit analysis in applying §316(b) is beyond dispute,[25] and Congress has

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[25] Since at least 1977, EPA has compared costs and benefits in making BTA determinations. *See, e.g., In re Pub. Serv. Co. of N.H., supra* at 11, *aff'd after remand, Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306 (1st Cir. 1979). EPA discussed this long history in the Phase II rulemaking, referring to the "'wholly disproportionate' cost-benefit test that has been in use since the 1970s." 67 Fed. Reg. 17,222, 17,224 (Apr. 9, 2002); *see also* Pet.App.157a (69 Fed. Reg. at 41,583). Furthermore, in *Seacoast* the First Circuit affirmed EPA's decision without expressing any reservations as to EPA's "wholly disproportionate" standard. 597

never amended §316(b) to prohibit EPA from comparing costs to benefits, nor has it otherwise expressed disapproval of EPA's cost-benefit approach to permitting. This absence of any change to §316(b) to overrule the Agency's long-standing interpretation, despite Congress's amendments to other CWA provisions, "provide[s] further evidence—if more is needed—that Congress intended [EPA's] interpretation, or at least understood [it] as statutorily permissible." *Barnhart v. Walton*, 535 U.S. 212, 220 (2002).

IV. THE SECOND CIRCUIT'S JUDGMENT SHOULD BE REVERSED IN PART

The Second Circuit remanded a number of provisions in the Phase II rule. Pet.App.93a–94a. Some of those provisions, such as the site-specific "cost-cost" and restoration provisions, were remanded for reasons unrelated to the question presented here. The portions of the Second Circuit's judgment remanding the national performance standards and the site-specific cost-benefit provisions, however, should be reversed. They were based on the Second Circuit's erroneous determination that §316(b) bars cost-benefit analysis at the national and local level.

First, the defect the Second Circuit saw in the national performance standards was that "it is impossible to tell whether the EPA based its decision on permissible cost-effectiveness analysis or exceeded its authority by relying impermissibly on a cost-benefit

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F.2d at 311. The First Circuit's treatment was sufficiently definitive that no one challenged EPA's interpretation in federal court again for nearly a quarter century.

analysis." Pet.App.36a. The court of appeals also remanded the national performance standards because they "set performance standards as ranges without requiring facilities to achieve the greatest reduction of adverse impacts they can." Pet.App.94a. In other words, "the Rule does not require facilities to choose technologies that produce the greatest reduction possible." Pet.App.28a. All of those rationales rest on the Second Circuit's erroneous belief that cost-benefit analysis is prohibited, and that the "best technology available" must be the one that reduces impingement and entrainment the most.

Second, the Second Circuit also remanded the section of the rule authorizing site-specific determinations of BTA based on a cost-benefit test, 40 C.F.R. §125.94(a)(5)(ii). As explained above, that holding also rested on the Second Circuit's determination that EPA had impermissibly authorized permitting authorities to weigh the costs and benefits at the local level. Pet.App.57a–60a.

CONCLUSION

The portions of the Second Circuit's judgment remanding EPA's determination of best technology available and related performance standards, as well as the site-specific cost-benefit provisions, should be reversed.

Respectfully submitted,

ELISE E. ZOLI
Counsel of Record
KEVIN P. MARTIN
ROBERT H. FITZGERALD
ALADDINE D. JOROFF
KEVIN P. PECHULIS
GOODWIN PROCTER LLP
53 STATE STREET
BOSTON, MA 02109
(617) 570-1000

ABIGAIL HEMANI
GOODWIN PROCTER LLP
NEW YORK TIMES
BUILDING
620 8TH AVENUE
NEW YORK, NY 10018
(212) 813-8800

CHUCK D. BARLOW
ENTERGY SERVICES, INC.
308 E. PEARL STREET
JACKSON, MS 39201
(601) 969-2542
Counsel for Entergy Corp.

MAUREEN E. MAHONEY
Counsel of Record
PHILIP J. PERRY
J. SCOTT BALLENGER
CASSANDRA S. BERNSTEIN
DREW C. ENSIGN
LATHAM & WATKINS LLP
555 11TH STREET, N.W.
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200

KARL S. LYTZ
LATHAM & WATKINS LLP
505 MONTGOMERY STREET
SUITE 2000
SAN FRANCISCO, CA 94111
(415) 391-0600

JOHN G. VALERI, JR.
PSEG SERVICES CORP.
OFFICE OF ENVIRONMENTAL
COUNSEL
80 PARK PLAZA, T5C
NEWARK, NJ 07102-4194
(973) 430-5506
Counsel for PSEG Fossil LLC, PSEG Nuclear LLC

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